

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MICHAEL NOCCO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99 C 5776
)	
ROGER COWAN,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

After a jury trial in the Circuit Court of Cook County, Michael Nocco was convicted of three counts of aggravated criminal sexual assault and was sentenced to eighty years in prison. He has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, claiming that he did not receive the effective assistance of counsel. For the reasons stated below, the Court denies Nocco's petition.

Facts

Nocco was charged with having sexual intercourse with his girlfriend's five year old daughter, identified as "C.N." At trial, C.N. (who by that time was seven years old) testified against Nocco. Also testifying for the prosecution were Michelle Mayo, who owned the building where Nocco, his girlfriend, and C.N. lived; Scott White and Howard Hatton, Cicero police detectives; Assistant State's Attorney Michael Connelly; Dr. Bernice Davis, a clinical psychologist; and Dr. Heriberto Torres, a medical doctor. Mayo testified that she overheard C.N. telling Mayo's daughter about Nocco having intercourse with her, and she repeated what C.N. had said. Mayo also testified that after examining

C.N.'s genital area and finding it swollen, she called the Department of Children and Family Services and eventually took C.N. to the Cicero Police Department. Detective White testified that he had interviewed C.N.; he reported her statements about what Nocco had done to her. Dr. Davis testified that she had evaluated C.N. while she was hospitalized and repeated what C.N. had told her about Nocco's activities. Detective Hatton and prosecutor Connelly testified about their interview of Nocco, stating that he had denied the allegation but later stated that he was sick and needed help and asked whether they could guarantee that he would go to a hospital rather than prison if he admitted the allegations. Dr. Torres testified that he had examined C.N.'s genital area and that what he observed was consistent with sexual abuse.

Nocco was convicted of three counts of aggravated criminal sexual assault; he was sentenced to a total of eighty years in prison. On appeal, Nocco argued that his lawyer was ineffective in failing to object to cumulative testimony; in failing to cross examine C.N.; and in making remarks in closing argument that allegedly suggested Nocco's guilt. The Appellate Court rejected these arguments and affirmed Nocco's conviction. *People v. Nocco*, No. 1-97-0451 (Ill. App. Aug. 14, 1998). Nocco's petition for leave to appeal to the Illinois Supreme Court was denied. Nocco then filed a habeas corpus petition in this Court, again contending that his lawyer was ineffective.

Discussion

A federal court may issue a writ of habeas corpus only if the state court's adjudication of the petitioner's claims resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. §2254(d);

Williams v. Taylor, 120 S. Ct. 1495 (2000). In this case, the Appellate Court reasonably and correctly applied federal law in evaluating Nocco's claim of ineffective assistance of counsel.

Nocco advances two arguments in his petition. His first argument is that his lawyer should have objected to testimony that was cumulative of C.N.'s testimony – presumably the testimony of Michelle Mayo, Detective White, and Dr. Davis. Each of these witnesses was permitted to relate what would otherwise constitute hearsay, pursuant to 725 ILCS 5/115-10, which provides that in a prosecution for committing sexual acts against a child, testimony about the victim's out of court statements describing the acts constituting the offense is admissible as an exception to the hearsay rule, if the child testifies at trial or is unavailable, and the court finds that the circumstances of the statements provide sufficient safeguards of reliability.

To establish that his lawyer was ineffective in failing to object to this testimony, Nocco must show that counsel's performance fell below an objective standard of reasonableness and that the trial was rendered fundamentally unfair or the result unreliable as a result of counsel's errors. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Nocco has failed to make the necessary showing. First, he has not shown that an objection to the testimony of Mayo, White, and Davis would have been sustained. Though Nocco has a point when he argues that repetition can lend credibility to testimony that it might not otherwise deserve, the prosecutor's argument in favor of admitting the testimony of Mayo, White and Davis undoubtedly would have included the flip side of that very argument: that one of the reasons why section 115-10 exists is to permit the prosecution to corroborate the testimony of a child witness – whose statements standing alone might be subject to attack – by showing that she has given a consistent account of the events. As

the Appellate Court noted in its decision, section 115-10 imposes no limit on the number of witness who can testify regarding the child's complaint. See *People v. Nocco*, slip op at 6 (citing *People v. Moss*, 275 Ill. App. 3d 748, 756, 656 N.E.2d 193, 199 (1995)). Nocco has failed to show that an objection would have been successful. Nocco's lawyer was not constitutionally ineffective for failing to make a losing objection.

Moreover, as the Appellate Court indicated, elimination of the allegedly cumulative testimony would not have made a difference in the outcome of the case. The non-cumulative evidence included Mayo's observations that C.N.'s genital area was red and swollen and Nocco's near admission of guilt in his statement to Detective Hatton and ASA Connelly. This evidence, plus C.N.'s own testimony, was more than sufficient to convict Nocco. Thus even if Nocco's lawyer performed unreasonably, Nocco was not prejudiced in the manner required by *Strickland v. Washington*.

Nocco's second contention is that in closing argument, his lawyer made disparaging remarks about him that indicated his guilt. The Appellate Court reasonably and correctly applied federal law in rejecting this argument. As described in Nocco's petition and in the Appellate Court's opinion, Nocco's lawyer told the jury that "[t]here is no question in this case that the charges against [Nocco] are horrendous and sickening. And if that's what you are going – if that's the basis on which you are going to decide the case, then he is guilty, then there is no question about it." *People v. Nocco*, slip op. at 7. But as the Appellate Court correctly noted, this was not an argument or a suggestion that Nocco was guilty, but rather "part of an argument that the case cannot be decided on mere charges, but on the evidence the jury heard from the witness stand." *Id.* Nocco's lawyer did not render ineffective assistance in making this or the other arguments referenced in Nocco's petition.

Conclusion

For the foregoing reasons, the Court denies Nocco's petition for a writ of habeas corpus. The Clerk is directed to enter judgment in favor of respondent.

MATTHEW F. KENNELLY
United States District Judge

Date: January 29, 2001